IN THE

Supreme Court of the United States

No. 400
October Term, 1961

CENTRAL RAILROAD COMPANY
OF PENNSYLVANIA,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

*On Appeal from the Supreme Court
of Pennsylvania*

BRIEF OF APPELLEE

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INDEX

	Page
Jurisdiction	1
Statutes Involved	2
Questions Presented	4
Statement of the Case	5
Summary of Argument	8
Argument:	
I. Pennsylvania, the State of Incorporation, May Tax All of Appellant's Rolling Stock Except That Having an Actual Situs Outside Pennsylvania	11
(a) Taxing powers of domiciliary states	11
(b) Cases construing state taxes on domestic corporations uphold the power to tax migratory rolling stock	16
(c) Cases construing state taxes on foreign corporations do not prohibit domiciliary state from taxing migratory rolling stock	22
(d) Rationale of court decisions supports jurisdiction of Pennsylvania to tax appellant's rolling stock	31
II. Appellant Has Not Shown That Any of Its Rolling Stock Acquired a Situs in Any State Outside Pennsylvania	35
(a) Appellant's freight cars used by other railroads	36
(b) Appellant's freight cars used by Central Railroad of New Jersey	42
III. No Lack of Equal Protection	48
Conclusion	50

Appendix—Excerpts From Car Service and Per Diem Agreement 54

TABLE OF CITATIONS

CASES:

Atlantic Coast Lines R. Co. v. Phillips, 332 U.S. 168, 67 S/Ct. 1584, 91 L. Ed. 1977 2

Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment, 347 U.S. 590, 74 S. Ct. 757, 98 L. Ed. 967 .... 27, 33

Charleston Fed. Sav. & Loan Asso. v. Alderson, 324 U.S. 182, 65 S. Ct. 624 89 L. Ed. 857 ... 49

Commonwealth of Kentucky v. Union Pacific R.R. Co., 214 Ky. 339, 283 S.W. 119 ...... 24, 31, 33, 42, 49, 52

Commonwealth v. American Bell Telephone Co., 129 Pa. 217, 18 A. 122 .... 3, 23

Commonwealth v. American Dredging Co., 122 Pa. 386, 15 A. 443 .... 3, 8, 12, 32

Commonwealth v. Koppers Co., Inc., 397 Pa. 523, 156 A. 2d 328, App. dis., 364 U.S. 286 49

Commonwealth v. N. Y. C. & St. L. RR. Co., 354 Pa. 388, 47 A. 2d 272, App. dis., 329 U.S. 682 48

Commonwealth v. Sunbeam Water Co., 284 Pa. 180, 130 A. 405 23

Commonwealth v. Union Shipbuilding Co., 271 Pa. 403, 114 A. 257 2

Commonwealth v. Universal Trades, Inc., 392 Pa. 323, 141 A. 2d 204, cert. den., 358 U.S. 129, 938 13

Commonwealth v. Western Maryland Rwy. Co., 377 Pa. 312, 105 A. 2d 336, cert. den., 348 U.S. 857 48

Cream of Wheat Co. v. Grand Forks Co., N.D., 253 U.S. 325, 40 S. Ct. 558, 64 L. Ed. 931 .. 14

Fidelity-Philadelphia Tax Case, 354 Pa. 355, 47 A. 2d 267 48

Flying Tiger Line, Inc. v. The County of Los Angeles, 51 Cal. 2d 314, 333 P. 2d 323 ...... 29, 33

Greenough v. Tax Assessors, 331 U.S. 486, 67 S. Ct. 1400, 91 L. Ed. 1621 15
Hale v. State Board of Assessment & Review, 302 U.S. 95, 58 S. Ct. 102, 82 L. Ed. 72 23
Illinois Central R.R. Co. v. Minnesota, 309 U.S. 157, 162, 60 S. Ct. 419, 84 L. Ed. 670 48
Liggett Co. v. Lee, 288 U.S. 517, 53 S. Ct. 481, 77 L. Ed. 929 49
Murray v. Philadelphia, 364 Pa. 157, 71 A. 2d 280 2
Nashville C. & S. L. Ry. Co. v. Browning, 310 U. S. 362, 60 S. Ct. 968, 84 L. Ed. 1254 48
Newark Fire Ins. Co. v. State Board of Tax Appeals, 307 U.S. 313, 59 S. Ct. 918, 83 L. Ed. 1312 14
New York Central R.R. v. Miller, 202 U.S. 584, 26 S. Ct. 714, 50 L. Ed. 1155 .... 8, 9, 16, 17, 18, 19, 20, 27, 28, 30, 32, 33, 34, 42, 52.
Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 64 S. Ct. 950, 88 L. Ed. 1283 .... 15, 19, 20, 21, 32
Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 69 S. Ct. 432, 93 L. Ed. 585 .... 27, 28, 33
Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 11 S. Ct. 876, 35 L. Ed. 613 .... 2, 11, 19, 26, 27
Southern Pacific Co. v. Kentucky, 222 U.S. 63, 32 S. Ct. 13, 56 L. Ed. 96 14
Standard Oil Co. v. Peck, 342 U.S. 382, 72 S. Ct. 309, 96 L. Ed. 427 .... 20, 21, 28, 33, 52
Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 26 S. Ct. 36, 50 L. Ed. 150 .... 16, 32

Statutes and Authorities Cited:

Pennsylvania Statutory Construction Act, Section 58(5), 46 P.S. §558 .... 3, 23
A.L.R. Vol. 110, pages 707, 713 11
L.R.A. Annotation 1915C, page 908 12
Corpus Juris Secundum, Vol. 84, page 226, Section 115 12
Ballentine Law Dictionary (2nd Ed.) 1207 35

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BRIEF OF APPELLEE

JURISDICTION

The Commonwealth of Pennsylvania, appellee, filed its Motion to Dismiss the present appeal on the ground that the appeal does not present any substantial Federal questions.

By order of this Court dated November 13, 1961, further consideration of the question of jurisdiction was postponed to the hearing of the case on the merits (R. 242).

STATUTES INVOLVED

This appeal involves the application of the Pennsylvania capital stock tax, the relevant portions of which are printed in the brief for the appellant, pages 2, 44, 45.

This Court will generally interpret state statutes in accordance with the construction placed on them by the highest court of the state.[1]

The Supreme Court of Pennsylvania has construed the capital stock tax as follows:

(a) *Nature of Tax*—it is a tax upon the actual value of the capital stock of a domestic corporation as represented by its property and assets;[2]

(b) *Property Exempt or Taxable*—so much of the capital stock of the corporation as is represented by real estate or personal property of a corporeal nature located in another state and *used in the operations of the corporation outside Pennsylvania* is exempt; but such personal property will be taxable in Pennsyl-

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[1] See *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18, 11 S. Ct. 876, 35 L. Ed. 613 (1891), where this Court said: "* * * whether this tax was in accordance with the law of Pennsylvania is a question on which the decision of the highest court of the state is conclusive."; see also *Atlantic Coast Line R. Co. v. Phillips*, 332 U.S. 168, 170, 67 S. Ct. 1584, 91 L. Ed. 1977, 1979 (1947).

[2] *Commonwealth v. Union Shipbuilding Co.*, 271 Pa. 403, 405, 114 A. 257 (1921); *Murray v. Philadelphia*, 364 Pa. 157, 166, 71 A. 2d 280, 284 (1950); and the instant case, R. 210.

vania as the domiciliary state *if it is not permanently located outside the state*;[3]

(c) *Effect on Property of Foreign Corporation*—the mere leasing of property in Pennsylvania by a foreign corporation does not constitute doing business so as to subject the corporation to the capital stock tax.[4]

The Pennsylvania Statutory Construction Act of May 28, 1937, P.L. 1019, provides in Section 58 in part as follows (46 P.S. §558):

> "All provisions of a law of the classes hereafter enumerated shall be strictly construed:
>
> " . . . .
>
> "(5) Provisions exempting persons and property from taxation;"

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[3] *Commonwealth v. American Dredging Co.*, 122 Pa. 386, 15 A. 443 (1888).

[4] *Commonwealth v. American Bell Telephone Co.*, 129 Pa. 271, 18 A. 122 (1889); in 1935 the Pennsylvania Capital Stock Tax Act was amended so that thereafter foreign corporations became subject to the franchise tax in lieu of the capital stock tax.

QUESTIONS PRESENTED

1. In imposing capital stock tax upon the property of a domestic railroad corporation having no tracks outside Pennsylvania, must the Commonwealth exempt the railroad's freight cars temporarily outside Pennsylvania which, being on lines of other railroads, had not acquired an actual situs in any other state?

2. Has the appellant, by merely showing that a certain number of its unidentified freight cars were temporarily outside Pennsylvania on other railroads in undesignated states, sustained its burden of proving that any such cars had acquired an actual situs in any other specific state, so as to require Pennsylvania to exempt them from capital stock tax?

3. Did the refusal of the taxing departments to grant appellant a property allocation for rolling stock on tracks of other railroads outside Pennsylvania violate equal protection because other railroads having tracks both inside and outside of Pennsylvania had received an allocation for rolling stock, based on track miles in Pennsylvania over track miles everywhere?

STATEMENT OF THE CASE

The appellant is a domestic railroad corporation, incorporated under the laws of Pennsylvania, and domiciled in Pennsylvania. It has no railroad tracks outside Pennsylvania, and thus does none of its railroad business, i.e., transportation by rail for hire, outside Pennsylvania.

The appellant has as its sole shareholder the Central Railroad Company of New Jersey, a New Jersey Corporation (R. 38a), referred to hereinafter as CNJ. During 1951 the appellant operated its railroad from the anthracite coal region in Pennsylvania to the New Jersey border at Easton, where it connected with the railroad lines operated by CNJ (R. 38a). Prior to 1946, appellant's lines had been operated under a lease agreement by CNJ with the equipment of CNJ, but in 1946, the appellant took over the operation of its lines in Pennsylvania and leased certain property and equipment from CNJ. The appellant also entered into an operating agreement with CNJ (R. 38a, 39a).

The appellant was not authorized to do business in any other state outside Pennsylvania, and did not pay corporation taxes to any other state (R. 38a).

The general officers and subordinate officials of the appellant were generally the same as those of CNJ and were on the payroll of CNJ (R. 41a, 45a). CNJ was then reimbursed by appellant for wages and salaries expended by it on behalf of work done for

attained a tax situs outside Pennsylvania", they were subject to a capital stock tax at full value (R. 215, 216).

However, the Court distinguished the appellant's railroad freight cars (including those on the line of CNJ) from the Diesel locomotives, and held that the latter should not be taxed at full value by Pennsylvania, because they had obtained a tax situs in New Jersey from continuous travel on fixed routes and schedules to and from New Jersey (R. 215). While no appeal has been taken by the Commonwealth from the adverse ruling as to Diesel locomotives, the Commonwealth, as appellee, reserves the right to maintain its initial position to the extent necessary to sustain the decision here appealed from.

SUMMARY OF ARGUMENT

The appellant is seeking a review by this Court of the decision of the Supreme Court of Pennsylvania holding that the appellant's freight cars which were temporarily outside Pennsylvania on lines of other railroads, had not acquired a tax situs outside Pennsylvania, and were therefore not exempt from the Pennsylvania Capital Stock Tax imposed on domestic corporations.

The capital stock tax has been construed so that tangible personal property will be taxable in Pennsylvania as the domiciliary State if it is not permanently located outside the State.[5]

The Commonwealth's first contention is that Pennsylvania, the State of incorporation, may tax all of appellant's rolling stock which has not acquired an actual situs in some other specific state.

The right of the domiciliary state to include in the measure of the tax such meandering freight cars was upheld by this Court in *New York Central R.R. (etc.) v. Miller.*[6] The ruling of that case has never been modified or overruled. Therefore, the present appeal does not present a substantial Federal question of due process or interstate commerce.

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[5] *Commonwealth v. American Dredging Co.*, 122 Pa. 386, 15 A. 443 (1888).

[6] 202 U.S. 584, 26 S. Ct. 714, 50 L. Ed. 1155 (1906).

Subsequent decisions relied upon by the appellant involving airlines and barge companies do not apply to the instant situation, because in all of these cases the taxpayer was itself operating its own equipment on its own routes outside the taxing jurisdiction and was therefore subject to taxation in such outside states. In the present case, the appellant had no tracks outside Pennsylvania, operated no trains outside Pennsylvania and paid no taxes on its property or franchises to any other state.

Appellant is contending that Pennsylvania must apportion the tax value of its freight cars, because their presence on the trains and tracks of other borrowing railroads throughout the United States subjects the appellant's freight cars to taxation by all 48 of the states through which pass all of the tracks of all of the borrowing railroads. Thus, if this Court should abandon its rule in the *New York Central Railroad* case and that of the courts below, every railroad in the United States can be subjected to tax by all of the states of the Union. This contention overlooks the elementary distinction between the tax liability of (a) a railroad doing its own business in a foreign state with its own tracks and equipment, and (b) a railroad which has no tracks or railroad business within the foreign state, but only freight cars borrowed under a mutual agreement solely for use in transit in the borrower's business.

The Commonwealth's further contention is that the appellant, by merely showing that a certain number of its unidentified freight cars were temporarily outside Pennsylvania on other railroads in undesignated

states, did not sustain its burden of proving that any such cars had acquired an actual situs in any other specific state during 1951, so as to require Pennsylvania to exempt them from capital stock tax.

Finally, in granting a track mileage exempt ratio for the freight cars of railroads having tracks both inside and outside of Pennsylvania, the Commonwealth did not discriminate against appellant, which had no tracks outside Pennsylvania. Thus, this classification, held reasonable by the courts below, does not present a substantial Federal question of equal protection.

ARGUMENT

I. Pennsylvania, the State of Incorporation, May Tax All of Appellant's Rolling Stock Except That Having an Actual Situs Outside Pennsylvania

(a) *Taxing Powers of Domiciliary States*

It is a well-established principle of law that the legislative power of every state applies to all property within its borders. For centuries personal property has been regarded as subject to the law of the owner's domicile, as expressed in the maxim *mobilia sequuntur personam.* This doctrine grew up in the Middle Ages when moveable property consisted chiefly of gold and jewels, and thus originally applied to tangible property wherever located. The situs of any such tangible personal property (mobilia) was at the domicile of the owner.[7]

While the rule has been limited so that it no longer applies to tangibles which have their tax situs away from the owner's domicile, the maxim still applies to property temporarily outside the taxing jurisdiction of the domiciliary state, if the property has not acquired an actual or permanent situs elsewhere.

In the Annotation in 110 A.L.R. 707, 713, the rule is stated as follows:

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[7] *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18, 22, 11 S. Ct. 876, 35 L. Ed. 613 (1891).

"The operation of the maxim 'mobilia sequuntur personam' is nullified with respect to taxation of tangible personal property only to the extent such property has acquired a *factual permanent situs elsewhere.* It follows that the power of the domicil under that maxim is not abrogated in respect to property which may be *temporarily absent* from its territorial jurisdiction. In short, *not until the property acquires an actual situs elsewhere does the domicil lose the right to tax.* * * *"

(Emphasis supplied.)

To the same effect, see Annotation in L.R.A. 1915C, page 908. See also 84 C.J.S., Taxation, §115, page 226, which states:

"* * * Thus in the absence of any evidence that tangible personal property has an *actual or permanent situs elsewhere* than in the state of the owner's domicile, it is taxable to the owner in such state, although it has never been brought within the boundaries of the state."

(Emphasis supplied.)

The Supreme Court of Pennsylvania has construed the Pennsylvania Capital Stock Tax in accordance with the principle that tangible personal property having no permanent situs outside Pennsylvania is subject to capital stock tax when Pennsylvania is the State of domicile.

In *Commonwealth v. American Dredging Co.*[8] the Court denied an exemption for so much of the ap-

[8] 122 Pa. 386, 391, 15 A. 443 (1888).

pellant's capital stock as was represented by four dredges, a tug boat and eleven scows which had been built outside of Pennsylvania and had never been within it, saying:

> "It must be conceded that *the property in question must be liable to taxation in some jurisdiction.* If it were permanently located in another state, it would be liable to taxation there. But the facts show that *it is not permanently located out of the state.* From the nature of the business, it is one place today and in another tomorrow, and, hence, not taxable in the jurisdiction where temporarily employed. It follows that *if not taxable here, it escapes altogether.* The rule as to vessels engaged in foreign or interstate commerce is that their situs for the purpose of taxation is their home port of registry, or the residence of their owner, if unregistered: Pullman Palace Car Co., 29 Fed. Rep. 66; Hays v. Pacific Mail Steamship Co., 17 How. 596. These vessels, if they may be so called, were not registered. *Hence, their situs for taxation is the domicil of the owners. This rule must prevail in the absence of anything to show that they are so permanently located in another state as to be liable to taxation under the laws of that state.*"

(Emphasis supplied.)

In *Commonwealth v. Universal Trades, Inc.*,[9] the present Pennsylvania Chief Justice, in sustaining the imposition of the capital stock tax on a domestic

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[9] 392 Pa. 323, 333, 141 A. 2d 204, 209 (1958), cert. den. 358 U.S. 129, 938.

corporation which transacted its business and held its intangibles in Florida, quoted with approval from the decision of this Court in *Cream of Wheat Co. v. Grand Forks Co. of N. D.*[10] as follows:

> "* * * The limitation imposed by the Fourteenth Amendment is merely that a state may not tax a resident for property *which has acquired a permanent situs beyond its boundaries.*"* * * The limitation upon the power of taxation does not apply even to tangible personal property without the state of corporation's domicile, if, like a seagoing vessel, the property has no permanent situs anywhere. Southern Pacific Co. v. Com. of Kentucky, 222 U.S. 63, 68, 32 S. Ct. 13, 56 L. Ed. 96 * * *"

(Emphasis supplied.)

The decision of this Court in *Cream of Wheat Co. v. Grand Forks Co. N. D.*, quoted above, was reaffirmed in *Newark Fire Insurance Co. v. State Board of Tax Appeals*,[11] where, in a concurring opinion joined by Justices Black and Douglass, Justice Frankfurter stated:

> "* * * the extent of a state's taxing power over a corporation of its own creation, recognized in the *Cream of Wheat* case, has neither been restricted nor impaired. That case has not been cited otherwise than with approval. * * *"

In *Southern Pacific Company v. Kentucky*,[12] in upholding a state property tax on a fleet of steamships

[10] 253 U.S. 325, 328, 329, 40 S. Ct. 558, 559, 64 L. Ed. 931 (1920).

[11] 307 U.S. 313, 324, 59 S. Ct. 918, 83 L. Ed. 1312 (1939).

[12] 222 U.S. 63, 68, 32 S. Ct. 13, 56 L. Ed. 96 (1911).

owned by a domestic corporation but permanently employed on the high seas, this Court said:

> "* * * The ancient maxim which assigns to tangibles, as well as intangibles, the situs of the owner for purposes of taxation has its foundation in the *protection which the owner receives from the government of his residence*. * * *"
>
> (Emphasis supplied.)

Likewise, in *Greenough v. Tax Assessors*,[13] this Court, summarizing this rule, said:

> "* * * And, where the taxable property of a corporation has no taxable situs outside the domiciliary state, that state may tax the tangibles *because the corporation exists under the law of its domicile*."
>
> (Emphasis supplied.)

See also *Northwest Airlines, Inc. v. Minnesota*,[14] where this Court said:

> "The taxing power of the domiciliary State has a very different basis. It has power to tax because it is the State of domicile and no other State is. * * *"

The foregoing decisions plainly confirm the power of the domiciliary state to tax the tangible personal property of a domestic corporation, unless such property has acquired a taxable situs outside the taxing state. This principle has been applied by this Court to rolling stock and other moveables, as shown by the decisions analyzed on the following pages.

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[13] 331 U.S. 486, 491, 67 S. Ct. 1400, 91 L. Ed. 1621 (1946).
[14] 322 U.S. 292, 297, 64 S. Ct. 950, 88 L. Ed. 1283 (1944).

(b) *Cases Construing State Taxes on Domestic Corporations Uphold the Power to Tax Migratory Rolling Stock*

The decisions of this Court have uniformly upheld the power of a domiciliary state to impose taxes on or measured by tangible personal property, irrespective of its physical location, unless it has acquired a taxable situs beyond the borders of the taxing state.

Perhaps the first significant case construing the taxing power of a state over a domestic corporation was *Union Refrigerator Transit Co. v. Kentucky.*[15] There Kentucky, the domiliciary state, attempted to levy personal property taxes on the rolling stock (refrigerator cars) of the Union Transit Company. The question, as stated by this Court, was whether a domestic corporation was "subject to taxation upon its tangible personal property, permanently located in other States, and employed there in the prosecution of its business". During the years involved, the cars were employed by the company but returned by them to the shipper who took possession of them in Wisconsin. This Court referred to this property as "*wholly and exclusively within the jurisdiction of another state*", and held that Kentucky could not tax it.

In *New York Central RR. v. Miller,*[16] this Court clarified the rule in the *Union Transit Company* case as to property which had not acquired a permanent situs outside of the state. The railroad involved was a domestic corporation owning or hiring lines without as well as within the state, having arrangements with

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[15] 199 U.S. 194, 201, 26 S. Ct. 36, 50 L. Ed. 150 (1905).

[16] 202 U.S. 584, supra, note 6.

other carriers for through transportation, routing and rating, and sending its cars to points without as well as within the State, and over other lines as well as its own. The court described the business of the railroad as follows (202 U.S. 593-594):

> "* * * The cars often are out of the relator's possession for some time, and may be transferred to many roads successively, and even may be used by other roads for their own independent business, before they return to the relator or the State. In short, by the familiar course of railroad business *a considerable proportion of the relator's cars constantly is out of the State, and on this ground the relator contended that that proportion should be deducted from its entire capital, in order to find the capital stock employed within the State.* This contention the comptroller disallowed."

(Emphasis supplied.)

The proceedings had been remitted to the comptroller for evidence as to whether any of Central's "rolling stock was used exclusively outside of the State". At the rehearing before the comptroller, "no evidence was offered to prove that any of the relator's cars or engines were used *continuously and exclusively outside of the State during the whole tax year*". Evidence showed movements of particular cars, and Central mileage and car mileage inside and outside of the State, in order to show that "a certain proportion of cars, although not the same cars, was continuously without the State during the whole tax year".

Parenthetically, it should be noted in the instant case that the appellant has offered no evidence as to freight cars continuously outside of Pennsylvania, but relies upon the ratio of "car days" in Pennsylvania over "car days" everywhere as the basis for its allocation of freight cars; see Stipulation of Facts, Exhibit "Y" (R. 130a-144a).

In deciding the *New York Central case*, this Court construed the New York Franchise Tax the same as the Pennsylvania Capital Stock Tax. The holding of the Court is summed up in the following language (202 U.S. 596-598):

> "* * * It is true that it has been decided that property, even of a domestic corporation, cannot be taxed *if it is permanently out of the* State. Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 201, 211; Delaware Lackawanna & Western R. R. v. Pennsylvania, 198 U.S. 341; Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U.S. 385. But it has not been decided, and it could not be decided, that a State may not tax its own corporations for all their property within the State during the tax year, *even if every item of that property should be taken successively into another State for a day, a week, or six months, and then brought back.* Using the language of domicil, which now so frequently is applied to inanimate things, the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts. * * *
>
> "* * * In the present case, however, it does not appear that any specific cars or any average

of cars was so continuously in any other State as to be taxable there. *The absences relied on were not in the course of travel upon fixed routes but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads.* Therefore we need not consider either whether there is any necessary parallelism between liability elsewhere and immunity at home."

(Emphasis supplied.)

Thus, the *New York Central* case, based upon facts similar to the facts in the present case, is ample authority for holding in the instant case that the appellant's rolling stock operated by other railroads outside of Pennsylvania had not acquired a tax situs outside of Pennsylvania, and are therefore taxable by Pennsylvania as part of appellant's property having a situs here.

The doctrine of the *New York Central* case was extended to the taxation of aircraft in *Northwest Airlines, Inc. v. Minnesota.*[17] This Court there sustained a personal property tax on the entire fleet of Northwest Airlines, inasmuch as Minnesota was the legal domicile, as well as the home state of the fleet. The Court held that the taxing power of the domiciliary state had a very different basis from that applied in *Pullman's Palace Car Co. v. Pennsylvania*,[18] wherein the property of a nondomiciliary carrier was apportioned to the taxing state on the number of miles

[17] 322 U.S. 292, supra, note 14.
[18] 141 U.S. 18, supra, note 7.

traveled within the state. The Court said (322 U.S. 298):

> "* * * But no judicial restriction has been applied against the domiciliary State except when property (or a portion of fungible units) is *permanently situated* in a State other than the domiciliary State. *And permanently means continuously throughout the year, not a fraction thereof, whether days or weeks.*"
>
> (Emphasis supplied.)

The appellant now contends that the broad scope of the *New York Central* case and the *Northwest Airlines* case was limited in *Standard Oil Co. v. Peck.*[19] That case involved the imposition of the Ohio ad valorem personal property tax on the barges owned and operated by an Ohio corporation. The maximum number of miles traveled by the barges on Ohio waters was 17½ miles. The Ohio taxing officials sought to tax the entire value of the barges because, inter alia, it was the domiciliary state.

The Majority Opinion of this Court, with 2 dissents, held that Ohio was not permitted to tax the whole value of the barges because they had acquired a situs in other states in which they were being operated by the taxpayer. However, this Court did not modify the rule set forth in the *New York Central* case and the *Northwest Airlines* case, but distinguished those cases as follows (342 U.S. 384):

> "* * * New York Central R. Co. v. Miller, 202 U.S. 584, sustained a tax by the domiciliary state

[19] 342 U.S. 382, 72 S. Ct. 309, 96 L. Ed. 427 (1952).

on all the rolling stock of a railroad. But in that case it did not apear that 'any *specific cars or any average of cars' was so continuously in another state as to be taxable there.* * * * Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, allowed the domiciliary state to tax the entire fleet of airplanes operating interstate; but in that case, as in the Miller case, it was not shown that 'a *defined part* of the domiciliary corpus' had acquired a taxable situs elsewhere. * * *"

(Emphasis supplied.)

This Court then pointed out "most, if not all, of the barges and boats which Ohio has taxed were almost continuously outside Ohio during the taxable year".

This Court then said in conclusion (342 U.S. 384-385):

"* * * The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. See Union Transit Co. v. Kentucky, 199 U.S. 194. Otherwise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations."

Assuming for purposes of argument that the *Standard Oil Company* case modified the broad rule in the *Northwest Airlines* case, nevertheless, the modification was on a restricted basis. The foregoing quotation shows that the decision was based upon (a) the rule of permitting taxation by several states on an

apportionment basis, and (b) the avoidance of multiple taxation of interstate operations."

It should be noted that neither of these bases apply in the present case. As to the rule of apportionment, such apportionment is not necessary in the present case, because the appellant is not registered to do business in any state other than Pennsylvania (R. 48a). As far as multiple taxation is concerned, there can be none. The appellant pays no capital stock tax or similar taxes as to its rolling stock in any other state (R. 49a).

(c) Cases Construing State Taxes on Foreign Corporations Do Not Prohibit Domiciliary State From Taxing Migratory Rolling Stock

The appellant argues that Pennsylvania, as the domiciliary State, does not have the power to tax the full value of the appellant's freight cars, because these freight cars spend some of their time outside Pennsylvania on lines of other railroads; and that this requires an apportionment of the Pennsylvania tax, because the freight cars outside Pennsylvania are subject to tax in other jurisdictions.

However, this argument has no merit unless the appellant's freight cars have acquired a situs in fact or in law in individual states which might subject them to a property tax *as property of the appellant.*

Preliminarily, it should be remembered that:

1. The appellant pays no capital stock tax or similar taxes as to its rolling stock in any other state (R. 49a, ¶12, R. 166a, ¶10).

2. The appellant has no tracks in any other state, and does no railroad business there (R. 165a, §3). Its cars are temporarily in transit while being used by the operating railroad on the tracks of that railroad and for the business of that railroad (R. 167a, §12).

3. The Pennsylvania capital stock tax would not be applied to the appellant's freight cars in the converse situation, i.e., if appellant were domiciled in another state, had no tracks in Pennsylvania, and did not operate its rolling stock in Pennsylvania.[20]

4. This converse situation was graphically illustrated when CNJ, which operated the same in New Jersey as appellant operated in Pennsylvania, reported to the Pennsylvania taxing authorities that it transacted no business within Pennsylvania (R. 55a, §26, R. 168a, §15). The general officers of CNJ were also the general officers of the appellant (R. 40a, §6, R. 67a, 68a, 166a, §7).

5. Appellant is here seeking an exemption. Exemptions from taxation are strictly construed against the person or corporation claiming such exemption.[21]

In order to defeat the jurisdiction of Pennsylvania to tax all of its rolling stock, the appellant has the burden of proving that the rolling stock in question

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[20] *Commonwealth v. American Bell Telephone Co.*, 129 Pa. 217, 18 A. 122 (1889).

[21] §58 (5) of the Pennsylvania Statutory Construction Act, 46 P.S. §558; *Commonwealth v. Sunbeam Water Co.*, 284 Pa. 180, 188, 130 A. 405 (1925); *Hale v. State Board of Assessment and Review*, 302 U.S. 95, 103, 58 S. Ct. 102, 82 L. Ed. 72 (1937).

has acquired an actual tax situs in some other state outside of Pennsylvania. A careful examination of the cases dealing with the jurisdiction of a state to tax the movable tangible property of a foreign corporation does not sustain the appellant's contention.

We have found only one case directly in point here, and the appellant has cited none. This case is *Commonwealth of Kentucky v. Union Pacific Railroad Co.*[22] There the Commonwealth of Kentucky levied a personal property tax upon freight cars owned by a foreign railroad, but present within the State on local railroads under a per diem lease arrangement like the one used by appellant in the present case. Kentucky also attempted to levy a franchise tax upon these foreign railroads on the theory that, by letting and hiring their freight cars for profit to domestic railroads, the foreign railroads were exercising a privilege not permitted by law to natural persons, and making large profits for which they should pay the State franchise tax. The court held that the property had not been within the State for a sufficiently long period of time to establish a situs for taxation other than that of the domicile of its owner. As to franchise tax liability, the court held that the presence of the freight cars within the State was not employment of the cars in the business of the foreign railroad, saying (283 S.W. 122, 123):

> "* * * A railroad freight car, however, is primarily designed for the use of the owning carrier on its own line. *It is not sent by its owner onto the line of another carrier in the prosecution of*

[22] 214 Ky. 339, 283 S.W. 119 (1926).

its owner's business, which is to carry freight on the line of such owner. It is sent onto the line of the connecting carrier *for the convenience of the shipper, and because the United States government requires railroads to do so in through routing.* The tank line and like companies receive a substantial profit from the use of their cars when in the foreign states, or at least their cars are so employed or used in the effort to make such profit. But the railroads do not send their cars into other states in the effort to make any profit from them while there. *The foreign railroads are not doing business in such states as are the tank line and like companies.* Although the freight cars of the foreign railroads are present in this state from time to time, yet each one is but temporarily so, and the cohesive principle which brings changing units together to form a whole which may be taxed—that is, the use and employment of them together as a whole by the owner in the prosecution of some purpose of his, usually business—is absent. * * *

"* * * * * * *

"From what we have said, it results that these foreign owned railroad cars had no situs for taxation in Kentucky during any of the years set out in the statement. If this be so, it then follows that, as these foreign railroads owned no property and did no business within this state during any of these years, they are not liable for the franchise tax here sought to be imposed. * * *"

(Emphasis supplied.)

Thus, we have here a judicial precedent which would directly rule that the freight cars of the appellant passing through the state of Kentucky under the car hire agreement with other railroads have not acquired a tax situs there. The same would be true in the other 46 states of Continental United States.

Although appellant can find no decision construing the tax situs of rolling stock absent from the domiciliary state under a car hire agreement, the appellant relies upon decisions which permit the non-domiciliary jurisdiction to tax movables of a foreign corporation which are within the state on a regular basis.

The first of these cases is *Pullman's Palace Car Co. v. Pennsylvania*, supra (141 U.S. 18). Here Pennsylvania was permitted to impose capital stock tax on Pullman cars used by the taxpayer in Pennsylvania on the basis of a mileage apportionment. There the test for the taxation of rolling stock was the "permanent presence" of such property within the borders of Pennsylvania, the taxing state. Thus, none of the Pullman cars were in Pennsylvania all of the time; but as this Court stated (141 U.S. 26):

> "* * * [although] particular cars may not remain within the State * * * the company has at all times substantially the same number of cars within the State, and *continuously* and *constantly* uses there a *portion* of its property. * * *"
>
> (Emphasis supplied.)

Thus, that decision recognized that the continuous and regular operation by a nonresident taxpayer of a fleet of migratory property in a non-domiciliary state

(Pennsylvania) established the permanent presence there of a portion of the fleet. This idea was reflected by Justice Holmes in *New York Central R. R. Co. v. Miller*, supra (202 U.S. 584), where he said that the taxability of rolling stock by a nondomiciliary state turned on the "continuous" presence of either "specific cars" or of an "average of cars" in the case of a fleet of such stock. The only reason why the court in the *Pullman's Palace Car Co.* case used the mileage allocation was to furnish a convenient and fair dimension as a measure of that portion of the rolling stock subject to taxation.

The second such case relied upon by the appellant is *Ott v. Mississippi Valley Barge Line Co.*,[23] in which the inland water craft of a shipping corporation were permitted to be taxed on a mileage apportionment basis by the non-domiciliary state.

The third case is *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*,[24] in which Nebraska was permitted to tax flight equipment of an interstate air carrier not incorporated in Nebraska on an apportionment basis of landings.

Neither of these decisions abandon the "permanent presence" test for the taxation of moveable property by non-domiciliary states, nor do they abate the distinction in the *Pullman's Palace Car Company* case between "permanent presence" as the *basis* for a tax on migratory property, and miles traveled or stops made within a state as the convenient *measure* to be used where a portion of a fleet of such property is

[23] 336 U.S. 169, 69 S. Ct. 432, 93 L. Ed. 585 (1949).
[24] 347 U.S. 590, 74 S. Ct. 757, 98 L. Ed. 967 (1954).

permanently present within a state because it is regularly and continuously employed there.

In the *Mississippi Barge Line Company* case, as stated by Mr. Justice Douglas, it was not necessary to determine whether the Pullman type apportionment formula approved in that case as a measure for the taxation of any fleet of inland water craft was applicable to the taxpayer's fleet of craft because the Louisiana statute in question " 'was intended to cover and actually covers here, an average portion of property permanently within the state—and by permanently is meant throughout the taxing year' ". Thus, the question was moot as to either the continued validity or the specific applicability of the Pullman test of a "permanent presence" for acquiring situs in nondomiciliary states.

Explicit support for the permanent presence of migratory property as the basis for taxation by nondomiciliary states appears in *Standard Oil v. Peck*, supra (342 U.S. 382) where again, as noted above, Justice Douglas reiterated the rule in *New York Central Railroad Company v. Miller*, supra (202 U.S. 584). Finally, in a concurring opinion in the *Braniff* case (347 U.S. 590, 603), he explains his position regarding his opinions in the *Mississippi Valley Barge Lines* and *Standard Oil Company* cases:

> "My understanding of our decisions is that the power to lay an ad valorem tax turns on the *permanency* of the property in the State. All the property may be there or only a fraction of it. Property in transit, whether a plane discharging passengers or an automobile refueling, is not

subject to an ad valorem tax. Property in transit may move *so regularly and so continuously* that *part* of it is always in the State. Then the fraction, but no more, may be taxed ad valorem."

(Emphasis supplied.)

Appellant also relies upon the *Flying Tiger Line, Inc. v. The County of Los Angeles*.[25] Although the decision rendered in this case was by a four to three vote, the Court was so divided in its opinion that no view earned the approval of the majority. Thus, only three members of the Court subscribed to the official opinion, on which appellant relies. The other four Justices (one in a separate concurring and three in the dissenting opinion) actually support the same principles for the taxation of migratory property as have been advanced by the Commonwealth. Their only disagreement arises over the application of such principles to the facts of the case. The following comments in the concurring opinion corroborates this conclusion (333 P. 2d 330):

> "That personal property has its situs at the owner's domicile, has long been recognized as a fiction employed to prevent migratory property from avoiding taxation completely. * * * This fiction was primarily used in cases involving ocean-going vessels which acquired no actual situs elsewhere. It was thought that if they were not taxable at the domicile they might not be taxable at all. * * *"

The trial court properly distinguished this case (R. 204a), inasmuch as the taxpayer there was operating

[25] 51 Cal. 2d 314, 333 P. 2d 323 (1958).

its own flights outside California. It should be noted that Delaware, not California, was the state of incorporation of this taxpayer.

Accordingly, none of the cases relied upon by appellant have weakened the permanent presence test for the taxation of migratory property by a non-domiciliary state. The rule in *New York Central RR. Co. v. Miller*, supra (202 U.S. 584), is still the law of the United States as to railroad rolling stock, and under that case Pennsylvania has the right to tax the full value of the appellant's rolling stock which is not permanently located in some other state.

Finally, the foregoing decisions relating to the taxation by the apportionment of movables in the non-domiciliary state can all be distinguished from the present case, because in each of those cases—Pullman cars, tank cars, airplanes or barges—the movables were operated by the taxpayer as part of the taxpayer's business in the non-domiciliary state imposing the tax. This distinction was aptly expressed by Judge Richards (R. 186a):

> "* * * It has not been demonstrated, at least to our satisfaction, that any part of the defendant's rolling stock has acquired a tax situs outside of Pennsylvania. The apportionment policy is inapplicable, because the defendant does not operate an interstate railroad. This distinguishes the present case from barge, tankcar and pullman car cases where the corporation engaged in its own business in several States. Our conclusion is that the tax situs of all of the defendant's rolling stock is Pennsylvania".

This same distinction was recognized in *Commonwealth of Kentucky v. Union Pacific RR. Co.*, supra (283 S.W. 119, 122), where the Court pointed out that it was "the business of the tank line, refrigerator, Pullman car, and like companies to send their equipment into the various states of the Union for the purpose of carrying goods" and that their cars were so employed in the foreign states in an effort to make a "substantial profit". On the other hand, a railroad freight car is not sent onto the line of another carrier in the prosecution of its owner's business but "for the convenience of the shipper, and because the United States government requires railroads to do so in through routing"; and this is not done "in the effort to make any profit from them while there" (283 S.W. 122).

In the present case, the freight cars are operated by other railroads on trains and tracks of their own and not by the appellant. Appellant is not engaged in the business of renting freight cars for profit, but in the business of running a railroad in Pennsylvania. Therefore, its rolling stock is subject to Pennsylvania property taxes until it acquires an actual tax situs elsewhere. As will be demonstrated in Subdivision II of this brief, infra, there is nothing in the record to show that a single piece of appellant's rolling stock ever acquired such a situs outside of Pennsylvania.

(d) *Rationale of Court Decisions Supports Jurisdiction of Pennsylvania To Tax Appellant's Rolling Stock*

An analysis of the decisions of this Court shows a pattern of permitting the state of the corporation's

domicile to tax its tangible personal property, unless the taxpayer can show an actual situs elsewhere for such property.

In *Union Transit Company v. Kentucky*,[26] this Court refused to permit the domiciliary state to tax such property as was definitely located "wholly and exclusively within the jurisdiction of another state".

In *New York Central R. R. (etc.) v. Miller*,[27] after citing the *Union Transit Company* case, this Court agreed that such property could not be taxed if it were permanently outside of the State, but permitted the domiciliary state to tax the rolling stock of the railroad corporation, because it did not appear that any specific cars or any average of cars were so continuously in any other state as to be taxable there; and the absences relied on were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads. This decision was relied upon by the court below in the instant case (R. 212, 215).

The court below had previously followed the permanent location test for tax situs, and also the test of non-taxability elsewhere.[28]

In *Northwest Airlines, Inc. v. Minnesota*,[29] this Court explained what it meant by property permanently situated in a state other than the domicile, i.e.,

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[26] 199 U.S. 194 (1905), supra, note 15.

[27] 202 U.S. 584 (1906), supra, note 6.

[28] *Commonwealth v. American Dredging Co.*, 122 Pa. 386, 15 A. 443 (1888).

[29] 322 U.S. 292 (1944), supra, note 14.

"continuously throughout the year, not a fraction thereof, whether days or weeks".

In *Standard Oil Co. v. Peck*,[30] this Court permitted the taxpayer to show that its vessels were continuously outside of the domiciliary state; but this was done to permit taxation on an apportionment basis, in order to avoid multiple taxation of interstate operations. But in the present case, there can be no multiple taxation, because appellant operated no trains outside of Pennsylvania (R. 185a).

The appellant did not pay corporation taxes in any other state (R. 49a). The other states through which the appellant's cars were passing while being operated and used by other railroads, would have had no power to impose taxes on the appellant measured by such cars. See *Commonwealth of Kentucky v. Union Pacific R. Co.*,[31] where the court held that Kentucky could not impose a tax on a foreign railroad as to its freight cars which were being operated within the state by a local railroad under a per diem lease agreement like the one used in the present case.

The decisions in *Ott v. Mississippi Valley Barge Line Co.*,[32] *Braniff Airways, Inc. v. Nebraska State Board*,[33] and *Flying Tiger Line, Inc. v. The County of Los Angeles*,[34] did not repudiate the test for apportionment, set forth in the *New York Central* case,

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[30] 342 U.S. 382 (1952), supra, note 19.

[31] 214 Ky. 339, 283 S.W. 119, 122, 123 (1926), supra, note 22.

[32] 336 U.S. 169 (1949), supra, note 23.

[33] 347 U.S. 590 (1954), supra, note 24.

[34] 51 Cal. 2d 314, 333 P. 2d 323 (1958), cert. den., 359 U.S. 1001, supra, note 25.

i.e., that the rolling stock must be so continuously in another state as to be taxable there. Furthermore, these decisions are distinguishable from the present case and the *New York Central* case because each of the taxpayers in those cases was engaged in carrying on its own business through the use of its own equipment within the non-domiciliary taxing state.

Therefore, the appellant's freight cars were correctly allocated to Pennsylvania for capital stock tax purposes, because (a) appellant is a Pennsylvania corporation and domiciled in Pennsylvania (R. 39a); (b) none of its freight cars had acquired a fixed or taxable situs outside Pennsylvania; and (c) all of appellant's freight cars outside of Pennsylvania were being operated by other railroads on the trains and tracks of such other railroads and for the business of such other railroads.

II. Appellant Has Not Shown That Any of Its Rolling Stock Acquired a Situs in Any State Outside Pennsylvania

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As pointed out in the previous subdivision of this brief, Pennsylvania, the State of domicile, had the power and jurisdiction to tax the appellant's freight cars unless the appellant could show that the freight cars had acquired a tax situs outside Pennsylvania. The court below concluded (R. 216):

> "* * * Since the freight cars used pursuant to the car service and per diem agreement of the Association of American Railroads have not attained a tax situs outside of Pennsylvania it follows that Pennsylvania is not restrained by due process considerations in its effort to tax this property at full value."

The appellant has failed to prove that any of its rolling stock has acquired a tax situs outside Pennsylvania. This failure has several aspects.

First. There is absolutely no evidence to show any location where any of the freight cars had acquired the alleged situs outside Pennsylvania, whether it be in Kentucky, Ohio or Nebraska. "Situs" is defined as "Location; local position; the place where a * * * thing is": Ballentine Law Dictionary (2nd Ed.) 1207. In what states are the appellant's meandering freight cars "located"? The record provides no answer. Appellant apparently proceeded on the premise that,

in order to deprive Pennsylvania of tax jurisdiction, all it had to show was that the unidentified rolling stock was absent from Pennsylvania during a portion of the year. Assuming that the evidence showed this (negatived infra), it is not sufficient to establish a fixed situs in a geographical location in a particular state outside Pennsylvania.

Second. Appellant has proceeded on the erroneous premise that the mere presence of its freight cars in some other unidentified state, wherever it may be, and for however brief a time, gives that state tax jurisdiction. However, tax situs is not determined by the number of days spent by an undesignated number of cars on a given railroad whose tracks may pass through one or more such states.

Thus, the evidence in this case does not provide any basis for holding that any percentage of appellant's rolling stock is exempt from taxation. This evidence will now be discussed with respect to (a) the appellant's freight cars used by other railroads, and (b) appellant's freight cars used by CNJ.

(a) *Appellant's Freight Cars Used by Other Railroads*

Appellant is a member of the "Association of American Railroads". Under a "Car Service and Per Diem Agreement"[35] entered into by members of the Association, the owning railroad is paid a per diem rate ($1.75) for its freight cars while on the lines

[35] Exhibit "X" R. 49a, 50a, §13, 130a; Appendix, this brief, pages 54-58.

of other subscribing railroad members and on the lines of non-subscribing railroads. In the latter event, the subscribing member delivering the freight car to non-subscriber is responsible to the owning subscriber for the per diem rate accruing on the car while on such non-subscribing road. Reports are required from the using subscriber to the owning subscriber (R. 49a, 50a, §13).

In construing the Car Service Per Diem Agreement, the trial court found as a fact, at the request of the Commonwealth, that when appellant's freight cars were employed on the lines of other railroads, they were under the sole operation and control of such other railroads, and not subject to control of the appellant (R. 167a). The provisions in this Agreement amply sustain this finding of fact.

The provisions of this Agreement (reprinted in part in the Appendix), clearly indicate that the freight cars of any subscriber such as the appellant, must be routed back toward the owner when they are on a foreign road. There is an underlying obligation of the borrowing railroad to direct the cars back to the owning railroad. Applying this to the present case, all of the railroads on which the cars of the appellant were being used had the obligation to so route them as to send them back to Pennsylvania at the earliest possible moment.

Under the Agreement, home cars (cars on the road to which they belong) "shall not be used for the movement of traffic beyond the limits of the home road when the use of other suitable cars under these rules is practicable" (Rule 1).

Similarly, foreign cars (cars on the road to which they do not belong) must be forwarded to the home road loaded or empty if they are on a direct connection (Rule 2(A)). If the cars are empty at the junction with the home road, and loading at that point via the home road is not available, they must be delivered to the home road at that junction (Rule 2(B)). But when the holding road has no physical connection with the home road and is obliged to use an intermediate road, the car may be delivered to the intermediate road (Rule 2(B)).

If the car is empty at other than junction points with the home road, the car may be loaded via any route so that the home road will participate in the freight rate, or moved locally in the direction of the home road, etc. (Rule 2(C)).

These and other provisions of the Car Service and Per Diem Agreement show the transitory nature of the use by other railroads of appellant's freight cars. The per diem charge is fixed at $1.75 without regard to the miles operated or type of car being used. The only exception is found in the case of refrigerator and tank cars, where the owning railroads may be paid on a mileage basis; see Exhibit "X", "Code of Per Diem Rules—Freight", Rule 1.

The appellant has attempted to establish a tax situs for its rolling stock on other *states* by showing the number of car hire days on other *railroads* (Exhibit "Y", R. 130a, 144a). Obviously, these statistics can bear no relation to the physical location of the cars, especially where the railroads which are operating the cars have tracks in more than one state.

No attempt has been made to trace the path of any specific car during 1951. Appellant bases its claim for an apportionment ratio on the statistics contained in Exhibit "Y" of the Stipulation of Facts, as summarized on statement "Y-6" (R. 144a). But this shows that the allocation of appellant's freight cars was based entirely on theoretical averages, and not on any information regarding the physical location of such cars.

The basic error in appellant's contention is that car hire for days of use on other railroads is not a valid test for determining the location of the appellant's individual cars. These statistics are meaningless. They can be used to prove many conflicting things. For that reason, no infallible conclusion can be drawn from them. Several examples will suffice to illustrate how these statistics do not aid appellant.

Example 1. Assume that each of appellant's freight cars spent some portion of the year on each of the 345 railroads referred to in Exhibit "Y" (R. 130a).

There are 605,678 car days attributed to 306 railroads not operating in Pennsylvania. This is 53.8% of the total car days and an average of 196.37 days out of the 365 days in the year. This gives an average of .65 days per year per railroad in this category. With the same approach as to 26 railroads operating in and out of Pennsylvania, we find that there is an average of 4.81 car days per year per railroad. For 12 foreign roads operating only in Pennsylvania, the average is .76 car days per year per railroad. When the ratio is applied to the appellant's lines, we find 33.94 car days per year per railroad. Therefore, as-

suming that each car spend as many days out of a year as possible on all of the different railroads, the car would have averaged 33.94 days on the appellant's road, and less than 5 days on any other railroad. The car would thus be operated on the appellant's lines 7 times as long as on the lines of any other railroad.

Example 2. The appellant seeks to have its freight cars, which are hired for use on railroads operating in and out of Pennsylvania, allocated to Pennsylvania on the basis of 35% of the average value thereof. This percentage can be determined either on the basis of revenue from per diem car hire (237,048 : 676,431 Exhibit "AA 1" (R. 146a) or on the basis of car days (135,455 : 386,532 Exhibit "Y 4" (R. 133a). In both computations, it was assumed that the road miles in Pennsylvania over total road miles of such railroads operating in and out of Pennsylvania, was the correct ratio for making such an allocation.

Such a formula can have no accuracy in determining the whereabouts of specific cars. Moreover, appellant's records do not indicate whether the mileage figures used for the other railroads included total track miles, or first track miles, or miles of tracks owned, leased and operated. There is no way to guess whether 365 car hire days represents 365 cars on the other railroads for one day each, or one car on another railroad for a full year.

Example 3. The 306 railroads which operate entirely outside of Pennsylvania (Exhibit "Y 5", R. 134a) have accumulated a total of 605,678 car hire days as to appellant's cars. This represents an average of 1,979 car days per year per railroad. This could be

as low as 6 cars on such railroad for the full year, or as high as 1,979 cars for such railroad for one day of the year.

The total per diem car hire allocated to Pennsylvania in the Stipulation of Facts (par. 19 (d), Statement AA-4, R. 53a) cannot be used as the basis for allocation, because it does not take into account the number of days the appellant's cars were operating on their own road.

Since Exhibit "Y" relates only to car hire days on railroads outside Pennsylvania rather than in states outside Pennsylvania, it can have no bearing on tax situs. Similarly, Exhibit AA (R. 146a-157a) can have no significance, because it is based upon the per diem car hire paid by specific railroads (R. 52a, 53a).

Appellant also relies upon statistics compiled for one month during the tax year (March, 1951), which showed the total number of appellant's freight cars, the number of units during that month on railroads operating wholly outside Pennsylvania, the number of units operated at some time during the month on roads within and without Pennsylvania, and the one unit upon a railroad wholly within Pennsylvania (R. 51a, 52a, 17). Appellant seeks to project these statistics for the entire year 1951, because it is the opinion of the appellant that such a situation prevailed through the year.

These statistics are meaningless. Even if the numerals for each category were the same each month (a highly unlikely coincidence), the units and the railroads thus enumerated would surely not be the same. The proposed projection of these statistics is

pure speculation without any basis of fact. They do not include the units operated on the appellant's railroad, which was operating entirely within Pennsylvania. They do not show that the units outside Pennsylvania were in any particular state or on any particular railroad for any length of time.

The net result of the evidence is that no court could possibly conclude that any of the appellant's rolling stock under the car hire agreement had acquired a tax situs outside Pennsylvania, or where the tax situs might be. This was the conclusion of the court below, of the Supreme Court of Kentucky in *Union Pacific Railroad v. Kentucky*,[36] of this Court in *New York Central R.R. v. Miller*,[37] and should be the conclusion here.

(b) *Appellant's Freight Cars Used by Central Railroad of New Jersey*

The Stipulation of Facts also contains evidence as to the business relations between the appellant and CNJ, its parent, with which it connected at the Pennsylvania-New Jersey border. An analysis of this evidence also indicates that none of the appellant's freight cars or the Diesel locomotives operated by CNJ over its lines in New Jersey ever acquired a tax situs in New Jersey.

Prior to August 5, 1946, the appellant's railroad lines, which were located entirely within Pennsylvania, were operated under lease by CNJ with its own

[36] 283 S.W. 119, supra, note 22.
[37] 202 U.S. 584, supra, note 6.

equipment. On August 5, 1946, appellant and CNJ entered into a Lease Agreement under which by direct ownership, or sublease, appellant took over the operation of the said railroad lines in Pennsylvania and leased said property and equipment from CNJ (R. 38a, 39a, 65a, Nos. 4, 5, 6).

On the same date, appellant and CNJ entered into an operating agreement (Exhibit "A", R. 59a), which provided in part as follows:

> "*Section* 1. In order to continue the existing through freight and passenger service over their respective lines, Central [CNJ] shall operate such through service in New Jersey to and from the State Line Junction, and Pennsylvania [appellant] shall operate such through service in Pennsylvania to and from the State Line Junction. Each party shall furnish its fair share of the locomotives and other equipment necessary to operate such service, and where efficient and economical operation so requires, shall temporarily lease locomotives and other equipment to the other party to enable the latter to perform its obligations under this Agreement. *To this end whenever in such through service any locomotive or unit of other equipment of one party shall enter on the line of the other party it shall thereupon be temporarily leased to and be operated by such other party until returned to the former's line*, and the latter shall pay the former rent for each such locomotive or unit of other equipment as hereinafter provided. Any locomotive so leased shall be leased upon a fully found basis, that is to say, except as otherwise provided in Sections

> 8 and 9 hereof, the lessor shall be responsible for and shall bear the entire cost arising from the ownership, maintenance and operating thereof and the lessee for any such expense incurred by the lessee."

(Emphasis supplied.)

It will be noted from the foregoing language that when a through train from Pennsylvania crosses the State line into New Jersey, it becomes the train of CNJ in every respect, and equipment of the appellant which passes into New Jersey in this manner is deemed to have been leased by the appellant to CNJ.

Section 2 and 3 of the Agreement provide for the rent of locomotives so leased under the Agreement. Section 4 indicates the rates for locomotive (60a). Rates are computed in the manner provided in Schedule A (R. 64a). A reference to Schedule A is most revealing. In addition to fuel, water, lubricants, and repairs, it provides for a return on investment of 4½% per annum on the depreciated value of the locomotive and also for taxes, i.e., "For Pennsylvania's [appellant's] locomotives of each class, 5 *mills per annum on the depreciated value thereof*".

This last provision indicates that the rentals received in 1951 by the appellant for its locomotives while on the lines of CNJ included an amount to cover the Pennsylvania 5 mills capital stock tax. Thus, appellant has already received from CNJ the 5 mills tax which it now seeks to avoid in the present case by an exemption. Not only has the appellant failed to pay any tax in New Jersey for these locomotives, but has also been paid the equivalent of the Pennsyl-

vania Capital Stock tax on such locomotives while they have been out of Pennsylvania.

The rent for rolling stock leased by the respective parties under the Agreement were to be at the rates set forth in the "Code of Per Diem Rules of the Association of American Railroads" (Section 5 (a), R. 60a). The lessor reimburses the lessee for repairs (Section 6, R. 61a). This means that the appellant's freight cars used by CNJ on its lines have the same status as those used by other railroads. This justified the distinction drawn by the court below between the appellant's freight cars and locomotives used by CNJ (R. 215).

Freight cars destined for points beyond the eastern terminal of CNJ (e.g., New England), would be treated by CNJ the same as freight cars from other subscribers to the Agreement. If such cars should ever be returned to the appellant via CNJ tracks, such return would bear no relation to the eastbound trip, and provide no "regular" basis for allocation.

The officers and employees who served both CNJ and the appellant were paid by CNJ, including railroad retirement and unemployment taxes and office expenses. Appellant then reimbursed CNJ to the extent of 32% for officers and employes in the freight and passenger traffic departments and 22% in other departments (Section 9, R. 62a, 166a).

The Agreement then provided as follows (R. 62a):

"Section 10. As between the parties, each party shall be solely responsible for personal injury or death suffered by any passenger, em-

ployee or other person or for loss or damage to property of any person, firm or corporation (including the parties) *[illegible] on the line of such party*, whether or not any locomotive or other unit of equipment leased to such party under this Agreement or the handling of through service under this Agreement shall have been involved therein. The foregoing shall apply notwithstanding that such liability may have been caused by the negligence or misconduct of an employee of the other party, whether or not such employee was at the time being used by the former party."

(Emphasis supplied.)

The foregoing provision also demonstrates that the operation of through trains either originating on, or destined for, appellant's tracks in Pennsylvania, are the complete responsibility of CNJ, and not the appellant, while such trains are operated in New Jersey (R. 169a, No. 17).

The Supplemental Agreement, made as of August 6, 1946, between CNJ and the appellant (Exhibit "B", R. 66a), provided for the temporary leasing of locomotives between the parties "for use in other than through service" on a basis similar to that used for locomotives operated in through service.

After studying the close relationship between CNJ and its subsidiary, the appellant, it is plain that the tax status of appellant in New Jersey is similar to that of CNJ in Pennsylvania. Appellant is not authorized to do business in New Jersey nor does it pay franchise or property taxes there (¶12, R. 49a;

166a, No. 15). Conversely, CNJ does no business in Pennsylvania, and pays no franchise or corporate net income taxes here (26, R. 55a; 168a, No. 15).

A consideration of the various agreements and other evidence in the Record, as outlined above, clearly indicates that the appellant has failed to sustain its burden of proof that any specific cars had acquired a situs in any other state outside Pennsylvania during 1951, or had even been continuously absent from Pennsylvania during that year.

III. No Lack of Equal Protection

The appellant contends that the tax in question violated the equal protection clause of the Fourteenth Amendment, because certain railroad companies having railroad track mileage inside and outside Pennsylvania received a mileage allocation against the rolling stock; whereas the appellant having no track mileage outside Pennsylvania did not receive such a mileage allocation.

A number of railroads which have track mileage inside and outside of Pennsylvania are consolidated railroads, i.e., railroads which have been domesticated in a number of different states.[38] In taxing such railroads domiciled in several states, the principle of *mobilia sequuntur personam* could be applied only on an apportionment basis; and there would be no other way to tax its rolling stock.

Any domestic railroad corporation which had tracks in other states would be entitled to such an allocation, because it was running trains in such other states, i.e., conducting its railroad business there.[39] Thus, the rolling stock apportioned in such other states on

[38] See *Commonwealth v. Western Maryland Railway Co.*, 377 Pa. 312, 105 A. 2d 336 (1954), cert. den., 348 U.S. 857; *Commonwealth v. N. Y. C. & St. L. R. R. Co.*, 354 Pa. 388, 47 A. 2d 272 (1946), app. dis., 329 U.S. 682; *Fidelity Philadelphia Tax Case*, 354 Pa. 355, 47 A. 2d 267 (1946).

[39] See *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 60 S. Ct. 968, 84 L. Ed. 1254 (1940); *Illinois Central R.R. Co. v. Minnesota*, 309 U.S. 157, 162, 60 S. Ct. 419, 84 L. Ed. 670 (1940) (R. 216).

a mileage basis would have a business and a tax situs outside of Pennsylvania. This situation does not apply to the appellant, because none of its cars or locomotives are engaged in its railroad operations when outside of Pennsylvania, but are being used by other railroads in their operations.[40]

Furthermore, the capital stock tax reports filed by railroads having track mileage inside and outside Pennsylvania did not indicate that the rolling stock to which the track mileage ratio was being applied included freight cars for which they received per diem car hire while on the lines of other railroads (R. 55a). In other words, the alleged discrimination, if any, would have been due to the imperfect knowledge of, or lack of notice to, or lack of inquiry by, the taxing officers, and would not constitute a violation of equal protection.[41]

In *Charleston Federal Sav. & Loan Asso. v. Alderson*,[42] this Court said:

> "Nor does the equal protection clause prohibit inequality in taxation which results from mere mistake or error in judgment of tax officials, [citing cases] or which is not shown to be the result of intentional or systematic undervaluation of some but not all of the taxes property in a single class. [citing cases]"

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[40] See *Commonwealth of Kentucky v. Union Pacific R. R. Co.*, supra, note 22 (283 S.W. 119).

[41] *Liggett Co. v. Lee*, 288 U.S. 517, 540, 53 S. Ct. 481, 77 L. Ed. 929 (1933); *Commonwealth v. Koppers Co., Inc.*, 397 Pa. 523, 532, 156 A. 2d 328 (1959), app. dis., 364 U.S. 286 (1960).

[42] 324 U.S. 182, 65 S. Ct. 624, 89 L. Ed. 857 (1945).

Moreover, the railroads having track mileage inside and outside Pennsylvania paid franchise or property taxes to the other states in which a portion of their railroad track mileage was located (R. 54a, 55a, §25), whereas the appellant was not qualified or authorized to do business in any other state than Pennsylvania, and did not pay franchise or property taxes to other states other than Pennsylvania (R. 49a, §12).

Therefore, the court below properly held[43] that the tax settlement did not violate equal protection of the law.

CONCLUSION

Pennsylvania as the state of appellant's incorporation and domicile has properly levied capital stock tax on the entire value of the appellant's capital stock, without any deduction for freight cars which were temporarily outside of Pennsylvania under car hire agreements with other railroads.

The appellant was doing all of its business in Pennsylvania. Its business was operating a railroad. All of its tracks were in Pennsylvania. When its freight cars were outside of Pennsylvania, they were being operated by other railroads on their lines in their railroad business, and not in the railroad business of the appellant.

The appellant has failed to prove that any specific cars had acquired a situs outside of Pennsylvania

[43] R. 216.

during 1951, and had even been continuously absent from Pennsylvania during that year.

The Car Service and Per Diem Agreement shows that the freight cars lent by appellant to foreign railroads could not have acquired a permanent tax situs outside Pennsylvania, because:

(a) The extent of the absence of appellant's freight cars from Pennsylvania, or any interruption in their transit, is beyond the control of the appellant.

(b) The borrowing railroads are required by the Agreement to so route the appellant's cars that they will return to Pennsylvania as soon as possible. This requirement confirms the Commonwealth's domiciliary theory of taxation, because of the concept of the cars in transit constantly seeking to return to their home railroads.

(c) The Agreement does not mention "rentals", but imposes a per diem charge of $1.75, irrespective of the type or size or value of the freight car. This is merely a unit fee charged by all of the participating railroads, inter se, for the mutual right to borrow freight cars for convenient use in the transportation business of the borrowing company.

None of these features applied to the moveables involved in the cases relied upon by the appellant. An analysis of the decisions relating to pullman cars, tank cars or refrigerator cars plainly shows that these cars were being leased by their owners for profit in the regular course of the owner's business i.e., furnishing pullman car service, tank car service or refrigerator car service. In each case, the lessor corpo-

ration, unlike appellant, had some control over the use of its cars by the shippers or other customers with whom it was doing business.

This situation falls squarely within the holding of this Court in the *New York Central RR.* case,[44] which permitted the state of domicile to tax rolling stock absent from that state on lines of other railroads. It has never been reversed or modified. In *Standard Oil Co. v. Peck*,[45] it was distinguished because in the *New York Central* case, as in the present case,

> "* * * it did not appear that 'any specific cars or any average of cars' was so continuously in another state as to be taxable there. * * *"

Conversely, it is also clear from the *Union Pacific RR.*[46] case that other states could not have taxed the freight cars of the appellant while they were absent from Pennsylvania. These railroad cases are still good law, and sustain the Commonwealth's position in the instant case.

The present settlement produces no unconstitutional results. The railroads which have received the track mileage apportionment of rolling stock have had tracks outside of Pennsylvania on which their own trains were operated. This fact distinguishes these railroads from the appellant and similar railroads which have all of their track mileage and train operations in Pennsylvania. Such a distinction between the two groups of railroads will be sustained, because it has a reasonable and logical basis. It would be im-

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[44] 202 U.S. 584, supra, note 6.
[45] 342 U.S. 382, supra, note 19.
[46] 283 S.W. 119, supra, note 22.

possible to grant a mileage allocation to appellant, because it has no tracks outside of Pennsylvania, nor does it operate any of its trains outside of Pennsylvania.

Accordingly, this appeal should be dismissed, and the judgment entered in favor of the Commonwealth of Pennsylvania, as modified and affirmed by the Supreme Court of Pennsylvania, should be affirmed by this Court.

Respectfully submitted,

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APPENDIX

EXCERPTS FROM EXHIBIT X

(R. 49a, 50a, 13, 130a)

CAR SERVICE AND PER DIEM AGREEMENT

DEFINITIONS

Home Car	A car on the road to which it belongs.
Foreign Car.	A car on a road to which it does not belong.
Private Car.	A car having other than railroad ownership.
Home.	A location where a car is in the hands of its owner.
Home Road	The road which owns a car, or upon which the home of a private car is located.
Home Junction . . .	A junction with the home road.
Subscriber	A road which is a subscriber to the Car Service and Per Diem Agreement.
Non-Subscriber . . .	A road which is not a subscriber to the Car Service and Per Diem Agreement.

CODE OF CAR SERVICE RULES—FREIGHT

RULE 1

Home cars shall not be used for the movement of traffic beyond the limits of the home road when the use of other suitable cars under these rules is practicable.

RULE 2

(A) Foreign cars on a direct connection must be forwarded to the home road loaded or empty in manner provided below:

(B) If empty at junction with the home road and loading at that point via the home road is not available, they must, subject to Rule 6, be delivered to it at that junction, unless an exception to the requirement be agreed to by roads involved. When holding road has no physical connection with the home road and is obliged to use an intermediate road or roads, to place the car on home rails under the provisions of this paragraph and the car has record rights to such intermediate road or roads, it may be so delivered.

(C) If empty at other than junction points with the home road, cars under this rule may be—

(1) Loaded via any route so that the home road will participate in the freight rate, or

(2) Moved locally in the direction of the home road, or

(3) When located in other than a Home District or a District contiguous thereto, loaded via any route to a destination within or in the direc-

tion of a Home District or to a destination within a District contiguous thereto (See Note D).

(4) Moved locally in an opposite direction from the home road, or delivered to a short line or a switching road, if to be loaded for delivery on or movement via the home road, or

(5) Delivered empty to home road at any junction point, subject to Rule 6, or

(6) Delivered empty to road from which originally received under load at the junction where received, or at another junction mutually agreed upon, if such road is also a direct connection of the home road, or

(7) Returned empty to the delivering road when handled only in switching service.

RULE 3

(A) Foreign cars at home on other than direct connections must be forwarded to the home road loaded or empty. Under this rule cars may be—

(1) Loaded via any route so that the home road will participate in the freight rate, or

(2) Loaded in the direction of the home road, or

(3) Moved locally in an opposite direction from the home road, or delivered to a short line or a switching road if to be loaded for delivery on or movement via the home road, or to a point in the direction of the home road, beyond the road on which the cars are located, or

(4) Delivered empty to road from which originally received, at the junction where received, or

at another junction mutually agreed upon, if impracticable to dispose of them under paragraph (1), (2) or (3) of this rule.

(5) When located in other than a Home District or a District contiguous thereto, loaded via any route to a destination within or in the direction of a Home District or to a destination within a District contingnous thereto (See Note D).

RULE 5

Empty cars of indirect ownership (Rule 3) to the road requesting the service may be short routed at a reciprocal rate of five cents (5c) per mile plus switching charges, with a minimum of one hundred (100) miles for each road handling the car, the road requesting the service to pay the charges.

RULE 6

If a movement of traffic requires return of empty cars to home road via the junction at which cars were delivered in interchange under load, the home road may demand return of empty cars at such junction, except that cars offered a home road for repairs, in accordance with the Interchange Rules of the Mechanical Division, must be accepted by owners at any junction point.

RULE 7

Cars shall be considered as having been delivered to a connecting railroad when placed upon the track agreed upon and designated as the interchange track for such deliveries, accompanied or preceded by proper data for forwarding and to insure delivery, and accepted by the car inspector of the receiving road.

Unless otherwise arranged between the roads concerned the receiving road shall be responsible for the cars, contents and per diem after receipt of the proper data (1) for forwarding and to insure delivery, and until they have been accepted by its inspector or returned to the delivering road.